

November 30, 1999

Todd Okun, Esq.

Styskal, Wiese & Melchione, LLP

550 North Brand boulevard, Suite 550

Glendale, CA 91203

Re: FOIA Appeal, your letter dated October 26, 1999

Dear Mr. Okun:

On September 8, 1999, you filed a Freedom of Information Act (FOIA) request for the applications, regional office summaries and Board orders for the community charter/expansion approvals of Point Mugu Federal Credit Union, CBC Federal Credit Union, First Service Federal Credit Union, Kennedy Space Center Federal Credit Union and El Paso Federal Credit Union. Dianne Salva, NCUA's FOIA Officer, replied to your request on October 19, 1999. You were provided with over 2000 pages of responsive documents. Some of the released pages contained redactions. Close to 400 pages were withheld in full. The redactions and pages withheld in full were made pursuant to exemptions 4, 5, 6, and 8 of the FOIA. 12 U.S. C. 552(b)(4), (5), (6) and (8). Your appeal is granted in part and denied in part. Enclosed are 23 pages of newly released information. Some of these pages contain redactions. The remaining pages withheld in part and in full continue to be withheld pursuant to exemptions 4, 5, 6 and 8 of the FOIA. A short description of the requested and responsive documents for each credit union and an explanation of the applicable exemptions follows.

Credit Unions

Point Mugu Federal Credit Union

Approximately 370 pages were released with no redactions, no pages were withheld in full.

First Service Federal Credit Union

Approximately 950 pages were released with no redactions. Approximately 210 pages were withheld in full. Information withheld concerned business and marketing policies and plans, audit opinion letters, financial projections, overlap analysis, and examination information for First Service FCU. Information was withheld pursuant to exemptions 4, 5, 6 and 8 of the FOIA. Enclosed are 4 unredacted pages and portions of 5 pages, all previously withheld in full. The remaining pages withheld in full and the portions redacted from the newly released pages continue to be withheld pursuant to exemptions 4, 5, 6 and 8.

CBC Federal Credit Union

Approximately 200 pages were released, some with redactions. Ms. Salva's letter indicates that approximately 123 pages were withheld in full. The number of pages withheld in full is actually closer to 100. Information redacted and pages withheld in full concerned the financial condition and CAMEL ratings, non-final staff opinions, examination and follow-up examination information of CBC FCU and other credit unions; and financial projections and marketing and business plans for CBC FCU. The information was withheld pursuant to exemptions 4, 5, and 8 of the FOIA. Enclosed are 10 unredacted pages and portions of 4 pages that were previously withheld in full. The remaining pages withheld in full and the portions redacted from the newly released pages continue to be withheld pursuant to exemptions 4, 5, and 8.

Kennedy Federal Credit Union

Approximately 286 pages were released with only one redaction for a CAMEL code rating. Approximately 60 pages were withheld in full. Information withheld includes examination material, CAMEL code ratings and business and marketing plans and projections for Kennedy FCU. The information was withheld pursuant to exemptions 4 and 8 of the FOIA. The redaction and all pages withheld in full continue to be withheld pursuant to exemptions 4 and 8.

El Paso Federal Credit Union

Approximately 300 pages were released, some with redactions. No pages were withheld in full. Information redacted concerned the financial condition and CAMEL ratings of El Paso FCU and other credit unions, and some information on business planning for El Paso FCU. The redacted information was withheld pursuant to exemptions 4 and 8 of the FOIA. None of the information redacted in the El Paso package is being released. The information continues to be withheld pursuant to exemptions 4 and 8.

Applicable FOIA Exemptions

Exemption 4

The information withheld pursuant to exemption 4 consists of business and marketing plans and budget and financial projections for credit unions that applied for the charter changes. Exemption 4 of the FOIA protects two categories of information: (1) trade secrets; and (2) information which is commercial or financial, obtained from a person and privileged or confidential.

5 U.S.C.552(b)(4). All of the information withheld is within the commercial/financial category. The term "commercial" has been interpreted to include anything "pertaining or relating to or dealing with commerce." American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 870 (2d Cir. 1978). All of the information withheld pursuant to exemption 4 meets the broad interpretation of commercial or financial information. Information "obtained from a person" has been held to include information obtained from a corporation. Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996). Information obtained from a credit union meets the standard of obtained "from a person" under Nadler. In Critical Mass Energy Project v. NRC, 975 F2d 871 (D.C. Cir. 1992),

cert. denied, 507 U.S. 984 (1993), the court established two distinct standards to be used in determining whether commercial/financial information submitted to an agency is "confidential" under exemption 4. According to Critical Mass, information required to be submitted to an agency (which is the case here) is confidential if its release would (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. See National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). We believe the information withheld meets the substantial harm prong of National Parks as noted in Critical Mass.

Exemption 5

The information withheld and redacted pursuant to exemption 5 consists of staff opinions and recommendations expressed prior to final action by the applicable Regional Office or the NCUA Board. Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." 5 U.S.C. 552(b)(5). Included within exemption 5 is information subject to the deliberative process privilege. The purpose of this privilege is "to prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). Any one of the following three policy purposes have been held to constitute a basis for the deliberative process privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982). The first and third policies enumerated in Russell apply in this case. The second policy does not apply since the NCUA Board has taken final agency action on the five community applications.

Exemption 6

The information withheld pursuant to exemption 6 consists of personal information about officials of one of the credit unions applying for a charter expansion. Exemption 6 of the FOIA protects information about an individual in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."

5 U.S.C. 552(b)(6). The courts have held that all information which applies to a particular individual meets the threshold requirement for exemption 6 protection. United States Department of State v. Washington Post Co., 456 U.S. 595 (1982). Once a privacy interest is established, application of exemption 6 requires a balancing of the public's right to disclosure against the individual's right to privacy. Department of the Air Force v. Rose, 425 U.S. 352, 272 (1976). Personal information about FCU officials has been redacted from three of the released pages. This information meets the threshold requirement for exemption 6 protection. There is minimal, if any, public interest in disclosing this personal information. The individuals' privacy interests outweigh any public interest in disclosure.

Exemption 8

The information withheld pursuant to exemption 8 consists of CAMEL code ratings and other financial condition and examination information including overlap analyses and safety and soundness concerns for the credit unions that applied for charter changes, as well as other credit unions within the requested communities. Exemption 8 of the FOIA (5 U.S.C. 552(b)(8)) applies to information:

contained in or related to examination, operating

or condition reports prepared by, on behalf of,

or for the use of an agency responsible for the

regulation or supervision of financial institutions.

The courts have discerned two major purposes for exemption 8 from its legislative history: 1) to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability; and 2) to promote cooperation and communication between employees and examiners. *See Atkinson v. FDIC*, 1 GDS 80,034, at 80,102 (D.C. Cir. 1980). Examination information fits squarely within the language of exemption 8. Both purposes outlined in *Atkinson* are met. Release of the information withheld could reasonably harm the financial security of a credit union and interfere with the relationship between a credit union and NCUA.

Pursuant to 5 U.S.C. 552(a)(4)(B), you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court in the district where the requester's principle place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

Robert M. Fenner

General Counsel

GC/HMU:bhs

99-1105

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Enclosure